90-823

No.



# In the Supreme Court of the United States

OCTOBER TERM, 1990

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LAWRENCE ALBERT
STAFF SERGEANT
UNITED STATES MARINE CORPS, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS**

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JOSEPH B. GILBERT
*Major, U.S. Marine Corps*
*Counsel of Record*

RANDALL L. CHAMBERS
*Lieutenant, JAGC,*
*U.S. Naval Reserve*

NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
*Washington Navy Yard,*
*Building 111*
*Washington, D.C. 20374*
*(202) 433-4161*

## QUESTION PRESENTED

Was Petitioner deprived of his Sixth Amendment right to effective assistance of counsel when his military defense counsel provided him with gross misinformation, and advised him to plead guilty, after failing to investigate easily accessible information?

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LAWRENCE ALBERT
STAFF SERGEANT
UNITED STATES MARINE CORPS, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS**

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The petitioner, Lawrence Albert, respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals, rendered in this proceeding on August 27, 1990.

## OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Albert,* 30 M.J. 331 (C.M.A. 1990), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Albert,* No. 88-4935, slip. op. (N.M.C.M.R. Aug. 21, 1989), is reprinted as Appendix B.

## JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on August 27, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).

## CONSTITUTIONAL PROVISION INVOLVED

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.

## STATUTES INVOLVED

10 U.S.C. § 867, Article 67(d), Uniform Code of Military Justice.

Review by Court of Military Appeals

> In any case reviewed by it . . . [t]he Court of Military Appeals shall take action only with respect to matters of law.

10 U.S.C. § 912a, Article 112a, Uniform Code of Military Justice.

Wrongful use, possession, etc., of controlled substances.

> (a) Any person subject to this chapter who wrongfully distributes [cocaine] shall be punished as a court-martial may direct.

10 U.S.C. § 934, Article 134, Uniform Code of Military Justice.

General Article.

> [A]ll conduct of a nature to bring discredit upon the armed forces . . . shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

## REGULATIONS INVOLVED

Department of Defense Pay and Entitlement Manual, Chapter 1, Paragraph 10316.

Military Confinement.

a. General. Pay and allowances accrue to a member in military confinement except:

(3) When the term of enlistment expires. See paragraph 10317 below.

Paragraph 10317.

Term of Enlistment Expires . . .

c. Enlistment Expires Before Trial. An enlisted member retained in the service for the purpose of trial by court-martial is not entitled to pay for any period after expiration of the enlistment unless acquitted or the charges are dismissed, or the member is retained in or restored to a full-duty status.

## STATEMENT OF THE CASE

Petitioner entered into a pretrial agreement whereunder he agreed to plead guilty to two charges.[1] His commanding general, on behalf of the government, agreed to suspend any confinement in excess of two years and "all for-

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[1] Petitioner pleaded guilty to violations of Article 112a, UCMJ, wrongful distribution of cocaine and Article 134, UCMJ, solicitation to commit prostitution and indecent acts. 10 U.S.C. §§ 912a, 934.

feitures in excess of $250 pay per month for one year." Appellate Exhibits I and II. At the time of this agreement, petitioner had completed his current enlistment contract but remained on active duty pursuant to an involuntary extension of his obligated service.[2] Prosecution Exhibit 1.

At trial, petitioner was convicted pursuant to his pleas of guilty, as agreed. Record at 48-49. He was sentenced to a bad-conduct discharge, 18 months' confinement, total forfeitures, and reduction to pay grade E-1. Record at 86. His commanding general suspended the forfeitures in accordance with the pretrial agreement. The Navy-Marine Corps Court of Military Review (NMCMR) affirmed the findings and sentence in an unpublished opinion. Appendix B. The Court of Military Appeals (CMA) subsequently affirmed NMCMR's holding. *U.S. v. Albert*, 30 M.J. 331 (C.M.A. 1990), Appendix A.

Due to his military defense counsel's erroneous advice, petitioner believed that his family would continue to receive his pay, less $250 per month, during his confinement. However, applicable regulations rendered him ineligible to receive any pay after his conviction because his obligated period of active service had expired.[3] Therefore, the portion of the pretrial agreement which limited the forfeitures of pay to $250 per month for a year was of no practical benefit to petitioner because, regardless of the sentence adjudged and approved, he could not have received any pay or allowances.

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[2] A military accused whose term of enlisted service has expired before trial is retained involuntarily in a "legal hold" status.

[3] Department of Defense Pay and Entitlement Manual Chapter 1, § 10317.

## REASON FOR GRANTING THE WRIT

### THE COURT SHOULD GRANT THE WRIT BECAUSE THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner was denied the benefit of the bargain he struck with the convening authority[4] in this case. Out of concern for his family's welfare, petitioner entered into a pretrial agreement, which, *inter alia,* stated in unambiguous language: "That, for good consideration and *after consultation with my counsel,* I agree to enter a voluntary plea of *guilty* [provided that all forfeitures in excess of $250 per month are suspended for one year]" (emphasis added). Petitioner bargained for this material and significant provision so that his family would continue to receive support during his anticipated incarceration.

Unfortunately for petitioner, at the time he signed this agreement, his period of obligated service had expired. As a result, petitioner was not entitled to further pay or allowances at the time the convening authority suspended the excess forfeitures—rendering this portion of the agreement impotent. Petitioner suffered this unexpected result because his military defense counsel failed to investigate this matter and provided him erroneous advice. Petitioner's sentence included six months' less confinement than the bargained-for two years. As a result, petitioner received nothing in return for his guilty pleas.

Whenever a plea is induced by a promise, the promise must be fulfilled or the defendant is entitled to relief. *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). Appellant's pleas were induced by the government's promise to limit confinement to two years

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[4] The convening authority is the officer who possesses the authority to create a court-martial and to refer charges to that court-martial. In this case, petitioner's commanding general convened the court.

and to ensure that his family continued to receive approximately $680 per month for the first twelve months of his confinement, and $930 each month thereafter.[5] The government made petitioner an illusory promise. Petitioner contends that his guilty pleas are improvident because his military defense counsel's assistance was so ineffective that it amounted to a denial of his constitutional right to counsel. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2952, 80 L.Ed.2d 674 (1984).[6] The *Strickland* standard applies to cases involving guilty pleas. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).[7]

The military defense counsel's failure to investigate petitioner's eligibility for pay and allowances was unreasonable under the circumstances.

The fact that petitioner was beyond his period of active service, coupled with petitioner's obvious desire to ensure his family's financial well-being during any term of incarceration, provided ample notice to counsel that he should further investigate petitioner's pay status. A simple phone call to a local disbursing clerk would have yielded this easily accessible information.

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[5] This approximation is based upon then current pay scales, which provide an E-1 with $671.40 base pay and $258.30 allowance for dependents (BAQ).

[6] *Strickland* established a two-part test for ineffectiveness of counsel: 1) Counsel's assistance must have been unreasonable under the circumstances; and 2) Defendant must demonstrate prejudice by showing a reasonable probability that absent counsel's errors, the proceeding would have produced a different result.

[7] *Hill* modified the second prong of the *Strickland* test by requiring a showing of reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty.

Analogous cases, decided by several circuits, have found similar acts unreasonable. In *Cook v. Lynaugh,*[8] the Fifth Circuit Court of Appeals found sufficient facts to alert a reasonably competent counsel of the need to investigate. Prior to trial, Cook's attorney received a trial memo which indicated that Cook was unrepresented by counsel at an earlier trial. Had the attorney investigated this matter further, he could have objected to the prior conviction's admissibility, thus precluding the government's use of this sole prior conviction to enhance the sentence under consideration. In this case, petitioner's military defense counsel, by virtue of his basic military training, possessed enough information to put a reasonably competent attorney on notice that he should investigate further, yet he failed to act.

Military defense counsel's failure to investigate resulted in petitioner being misinformed. Such misinformation has been ruled unreasonable. Counsel is held accountable, not for a prediction that proved wrong, but for a misstatement of easily accessible fact. *U.S. Ex Rel. Hill v. Ternullo,* 510 F.2d 844 (2nd Cir. 1975).

When counsel provides gross misinformation in response to defendant's inquiries, and the defendant relies upon that information, then defendant has been denied his constitutional right to counsel. See *Strader v. Garrison,* 611 F.2d 61 (4th Cir. 1979) (Ineffective assistance when counsel erroneously advised client concerning parole eligibility date); *Downs-Morgan v. U.S.,* 765 F.2d 1534 (11th Cir. 1985) (Counsel's erroneous response to specific inquiry by accused concerning deportation held ineffective assistance); *U.S. v. Nagaro-Garbin,* 653 F. Supp. 586 (E.D.Mich. 1987) (Counsel's misinformation concerning deportation held ineffective assistance).

---

[8] 821 F.2d 1072 (5th Cir. 1987).

and to ensure that his family continued to receive approximately $680 per month for the first twelve months of his confinement, and $930 each month thereafter.[5] The government made petitioner an illusory promise. Petitioner contends that his guilty pleas are improvident because his military defense counsel's assistance was so ineffective that it amounted to a denial of his constitutional right to counsel. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2952, 80 L.Ed.2d 674 (1984).[6] The *Strickland* standard applies to cases involving guilty pleas. *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).[7]

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Military defense counsel's failure to investigate resulted in petitioner being misinformed. Such misinformation has been ruled unreasonable. Counsel is held accountable, not for a prediction that proved wrong, but for a misstatement of easily accessible fact. *U.S. Ex Rel. Hill v. Ternullo,* 510 F.2d 844 (2nd Cir. 1975).

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[8] 821 F.2d 1072 (5th Cir. 1987).

The pretrial agreement in this case expressly stated that petitioner reached his decision after consultation with counsel. Petitioner's counsel apparently responded to petitioner's inquiries regarding a limitation on forfeitures with gross misinformation—information which petitioner relied upon, to his clear detriment, in reaching his decision to plead guilty.

Petitioner was prejudiced by his counsel's errors. A reasonable probability exists that, but for his attorney's misrepresentation, petitioner would not have pleaded guilty.

If the implicitly promised inducement—that petitioner's family would not be left penniless while he languished in prison—had been unimportant to him, he would have had no reason to negotiate for the forfeiture provision. The plain language of the pretrial agreement, quoted above, leaves no doubt that the forfeiture provision was a substantial part of the *quid pro quo* for petitioner's guilty pleas.

Writing for the Court of Military Appeals, Chief Judge Everett opines that, since petitioner was ineligible for pay and allowances under applicable pay regulations, he is no worse off than he would have been had the military judge awarded forfeitures and no confinement.[9] Unlike the accused in *Warner,* Chief Judge Everett's analogy here fails to consider the fact that confinement blocked any other means petitioner may have had to earn a living for himself and his family.

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[9] Such a sentence would have rendered the portion of the pretrial agreement relating to forfeitures inoperative by its own terms. While the Chief Judge cited no authority, his proposition likely stems from an earlier C.M.A. opinion. *U.S. v. Warner,* 25 M.J. 64 (CMA 1987) bars a sentence which includes total forfeitures when no confinement has been imposed. Chief Judge Everett, who authored *Warner,* apparently reasons here that this pretrial agreement provision was just as innocuous as a provision which the law bars in the interest of public policy or fundamental fairness.

Chief Judge Everett also stated that petitioner would have pleaded guilty even if the forfeiture provision had not been included in the pretrial agreement. Nothing in the record supports this conclusion of fact.[10] To the contrary, the pretrial agreement's express language shows that the forfeiture provision provided a powerful inducement for him to plead guilty.

In the words of Chief Judge Haynesworth, "The simple fact is that the defendant was misled by erroneous advice. When the misadvice of the lawyer is so gross as to amount to a denial of the constitutional right to effective assistance of counsel, leading the defendant to enter an improvident plea, striking the sentence and permitting a withdrawal of the plea seems only a necessary consequence of the deprivation of the right to counsel."[11]

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[10] The court acted improperly in making this finding of fact because CMA has no fact finding authority. See 10 U.S.C. § 867, Article 67, Uniform Code of Military Justice.

[11] *Strader*, 611 F.2d at 65.

## CONCLUSION

This Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOSEPH B. GILBERT
*Major, U.S. Marine Corps*
*Counsel of Record*

RANDALL L. CHAMBERS
*Lieutenant, JAGC,*
*U.S. Naval Reserve*

NAVY-MARINE CORPS APPELLATE REVIEW ACTIVITY
*Washington Navy Yard,*
*Building 111*
*Washington, D.C. 20374*
*(202) 433-4161*

NOVEMBER 1990

**APPENDIX A**

# U.S. COURT OF MILITARY APPEALS

No. 63,463
NMCM 88-4935

UNITED STATES, APPELLEE

*v.*

LAWRENCE ALBERT
STAFF SERGEANT
U.S. MARINE CORPS, APPELLANT

Submitted Feb. 21, 1990.
Decided Aug. 27, 1990

**OPINION OF THE COURT**

EVERETT, Chief Judge:

Appellant entered into a pretrial agreement whereunder he agreed to plead guilty to two charges and the convening authority obligated himself to suspend any confinement in excess of 2 years and "all forfeitures in excess of $250 pay per month for . . . 1 year." At the time of this agreement, appellant was serving on active duty pursuant to an involuntary extention of his obligated service.

At trial, appellant entered the guilty pleas as agreed and was convicted pursuant thereto. The sentence adjudged was a bad-conduct discharge, 18 months' confinement, total forfeitures, and reduction to pay grade E-1. The convening authority suspended the forfeitures in accordance

with the pretrial agreement; and the findings and sentence, as approved by the convening authority, were affirmed by the Court of Military Review in an unpublished opinion.

Under applicable regulations and a decision of the Comptroller General,* Albert was not entitled to receive any pay after his conviction because his obligated period of active service had expired and had been involuntarily extended pending trial by court-martial. Therefore, the portion of the pretrial agreement which limited the forfeitures of pay to $250.00 per month for a year was of no practical benefit to appellant because, regardless of the sentence adjudged and approved, he would not have received any pay or allowances.

With this in mind, appellant now has raised this issue, review of which we granted:

> WHETHER THE GOVERNMENT FULLY COMPLIED WITH THE TERMS OF APPELLANT'S PRETRIAL AGREEMENT.

If we answer this issue in the negative, Albert would be entitled to relief—either enforcement of the agreement or setting aside the guilty pleas as improvident. Certainly, when a prosecutor violates a plea bargain, the defendant is entitled either to specific performance or to an opportunity to withdraw his guilty pleas. *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

In *United Stated v. Olson,* 25 MJ 293 (CMA 1987), we gave relief to an accused who had complied with the terms of his pretrial agreement but, due to action by the Government, had not received the benefit of his bargain. *See also United States v. Churnovic,* 22 MJ 401 (CMA 1986) (convening authority attempted to prosecute the accused after promising not to do so); *United States v. Brown,* 13 MJ 253 (CMA 1982) (convening authority acted without the

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* *Cf.* 39 Comp. Gen. 42 (1959).

promised input of a particular staff judge advocate); *United States v. Cifuentes,* 11 MJ 385 (CMA 1981) (convening authority commuted a fine to forfeitures after promising to disapprove any fine adjudged); *United States v. Jenkins,* 30 MJ 1101 (NMCMR 1989) (convening authority approved the sentence as adjudged after promising to suspend portions of the punishment).

This case, however, is different from *Olson,* where the Air Force recouped $1,107.07 in restitution after representing at trial that the accused already had made the restitution agreed upon. Here, no representation was made by the convening authority or trial counsel; and the convening authority did exactly what he had promised to do. Moreover, the pretrial agreement was proposed by appellant and his counsel; and in no way was it forced upon him by the Government.

Appellant is not entitled now to complain that the approved sentence had collateral consequences unforeseen by any of the parties. Indeed, the result here is governed by *United States v. Bedania,* 12 MJ 373 (CMA 1982), which held that the accused's entitlement to pay was beyond the purview of the court-martial and the pretrial agreement. *Cf. United States v. Pajak,* 11 USCMA 686, 29 CMR 502 (1960); *United States v. Cleckly,* 8 USCMA 83, 23 CMR 307 (1957).

If the military judge had adjudged a sentence which included forfeitures but no confinement, the portion of the pretrial agreement concerning forfeitures would have been inoperative by its own terms, and the sentence itself would have had no effect on appellant's pay. Nonetheless, under the applicable pay regulations, appellant would have received no pay and allowances. He can hardly complain that he will not receive any pay or allowances even though the convening authority reduced the adjudged sentence exactly as had been promised.

We also disagree with any contention by appellant that his pleas of guilty were improvident because in some way they had been induced by the convening authority's promise to suspend forfeitures in excess of $250 per month for 1 year. Even making allowance for Albert's desire to assure that his family would receive support during any period of confinement, we are convinced beyond any reasonable doubt that, if he had been fully apprised of his pay status as it existed at the time and had been offered a pretrial agreement which limited confinement but included no reference to forfeitures, he would have accepted it and entered the same pleas of guilty.

We conclude, therefore, that the Government complied with the pretrial agreement, that the guilty pleas were provident, and that the findings based thereon should not be set aside.

The decision of the United States Navy—Marine Corps Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

**APPENDIX B**

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

Before E. M. ALBERTSON, R. A. STRICKLAND and J. E. RUBENS

UNITED STATES

*v.*

LAWRENCE ALBERT, 168 44 4441
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCM 88 4935 Decided 21 August 1989

Sentence adjudged 25 August 1988. Military Judge: M. J. Cummings. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Expeditionary Brigade, Fleet Marine Force, Marine Corps Air Station, Kaneohe Bay, HI 96863-5501.

LT JACOB R. WALKER, JAGC, USNR, Appellate Defense Counsel

LT ROBERT A. KEMINS, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the two assignments of error, and the Government's response, and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the accused was committed.

With respect to the first assignment of error, the fact that appellant was past his EAS and that his pay stopped when the convening authority took his action[1] is collateral to his court-martial. The sentence adjudged at the court-martial did not end appellant's active service; that was a contract matter which predated the court-martial. Since the court-martial did not cause the end of appellant's active service, there is a question whether the resulting loss of pay is a collateral "consequence." Given the apparently overwhelming evidence against appellant (audio tapes with transcripts made by undercover NIS agents), the maximum authorized punishment, the Government's withdrawal of Charge II pursuant to the pretrial agreement, and the confinement cap of two years in the pretrial agreement (although not triggered by the adjudged sentence), we find that even if the stopping of appellant's pay is a collateral consequence of the court-martial, it is not major or substantial. Appellant would likely have pled guilty anyway. Thus, we find that the pleas are provident. *See United States v. Bedania,* 12 M.J. 373, 376 (C.M.A. 1982); *see also United States v. Walls,* 3 M.J. 882, 884 (ACMR. 1977) (misapprehension about maximum imposable sentence did not render guilty plea improvident), *aff'd,* 9 M.J. 88 (C.M.A. 1980). With respect to the second assignment of error, we specifically find that the adjudged sentence is appropriate under the circumstances.

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[1] Appellant argues that this nullifies the pretrial agreement term providing for partial suspension of forfeitures.

Accordingly, the findings of guilty and sentence, as approved on review below are affirmed.

E. M. ALBERTSON, *Senior Judge*

R. A. STRICKLAND, *Judge*

(ABSENT/CONCURS)
J. E. RUBENS, *Judge*